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## **Prosecuting through the European Public Prosecutor's Office (EPPO)**

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**Abstract:** The present paper aims to analyze the role of the EPPO in a specific context, namely that of criminal prosecution. The EPPO acts as a public prosecutor, seeking on the one hand to guarantee and protect individual rights, such as those of accused persons, and on the other hand, plays a special role, both before and after criminal prosecution. The progress has been made on this new path, the protected rights, the issues of European jurisdiction, criteria for choosing the forum, the risk of double jeopardy, rules of adjudication, the role and acceptance of evidence, etc., are some of the topics that analyzes the present research.

**Keywords:** EPPO; criminal prosecution; EDP; national law; ECtHR; principle of legality; European Public Prosecutor's Office; conditions of admissibility; criteria for choosing the forum; dismissal of the case; double jeopardy; evidence gathering.

## **Introduction**

The EPPO has identified and referred to crimes that are indicated by the PIF Directive, as a body that has been provided for by TFEU. According to Art. 86 TFEU, it: “exercises criminal prosecution before the judicial bodies of the Member States”.

The exercise of the rules of the treaty is entrusted to the EPPO. It has a monopoly and is the sole holder of the EPPO Regulation relating to the crimes committed. The topic is addressed by distinguishing between two paths.

The first path of a possible action that has a competing and subsidiary nature, that is exercised by other bodies of the Union. This is an action that is exercised by subjects that are connected with the national legal systems.

Speaking of competition we refer to the action as legitimacy that has to do with the subject that is different from EPPO and that is applied outside the exercise of the prosecution that maintains the relative power to act. In the second path the subsidiary action presents a different subject. Such an action is exercised only by the EPPO.

At the European level the titular subject is EPPO. It has a disruptive power of action, according to Art. 86 TFEU. It is a European body that carries out judicial functions with external helpers the OLAF and Eurojust that cannot however exercise the

criminal action.

The ownership of the power of action is also distinguished from the action that can be exercised by national authorities, as well as the action that can be exercised by other subjects that are not attributable to this category.

The distinction is part of Art. 25, par. 1 of the EPPO Regulation, which establishes that the European Public Prosecutor exercises its attribution through the national authorities that are competent and that do not exercise their competence in relation to the criminal conduct.

The rule of the Regulation wants for the national authorities not to be able to exercise the action of EPPO (Herrnfeld, 2021). The provision for the subjects is different. Private individuals are granted the right/faculty, if it is provided for by domestic law, to exercise their action for the crimes of PIF.

The responsible public authority for the exercise of the action is the public prosecutor. It is not impossible to think of cases that give actions and entrust in an exclusive way different subjects for subsidiary and concurrent actions. Its legitimacy and the related eventualities are connected with hypotheses of actions entrusted exclusively to subjects, who are external to the public prosecutor's office such as the subtraction of the power of action, the admissibility of the case according to the rules of the national legislator.

The ownership of the action is entrusted to public, private subjects, who are different from the public prosecutor for PIF crimes and as is reconciled by EPPO Regulation.

National criminal procedure codes are able to instruct and regulate the action exercised by the public prosecutor without a configuration of the monopoly derogation. A power that will be held by the judge to exercise the criminal action for the injured party and only in the event that the public prosecutor does not reach his opinion on an appeal that is presented through a subsidiary path that respects the initiative of the public prosecution.

For EPPO the problem, in this regard, arises in front of the PIF case, which attributes the knowledge of its own judge. The EPPO Regulation together with the principle of primacy of the law of the Union exclude the applicability of a discipline that attributes to the judge the power to exercise the action. And the hypothesis for the subsidiary action of the injured party, that is exercised only in the case of inertia, as a European body, is admissible.

For PIF crimes, the European Public Prosecutor's Office is competent to apply the general rules. The national public prosecutor's office is replaced by EPPO for all European crimes. It is considered that the power to exercise actions in this regard belongs to the college of ex Art. 7 with the conclusion that

results disapplicated in the case of crimes that are identified by the EPPO Regulation.

The exercise of actions in this regard is entrusted to subjects that are different from the public prosecutor's office, according to Art. 25 of the EPPO Regulation. The initiative is blocked when the European Public Prosecutor's Office is moved. The EPPO does not exercise its attribution, in this case, but claims the exercise of the conditions that are necessary and indicated in Art. 25, parr. 2 and 3 of the EPPO Regulation.

The national authorities, therefore, are free to start and/or continue their investigations according to the terms established by national law. National authorities exercise criminal prosecution after the European Public Prosecutor has initiated the investigation and decides to archive the news of the crime. This anticipates the possibility and probability of exclusion.

For EPPO, national authorities affirm the basis of recital n. 13 of the EPPO Regulation for concurrent competences, in the sense that the crimes included in the regulation are attributed and there is no system of dividing them in an exclusive way. The affirmation of the ownership of the exercise of the action in this regard and the provisions deduce that EPPO and national authorities have the power to carry out investigations and act in the same state (Mitsilegas, 2021).

All these positions are considered and carried out from the European Public Prosecutor, which enjoys the monopoly of exercising the action for the crimes attributed.

The action of the EPPO considers in a monopolistic and subsidiary manner the national authorities provided for by Art. 34, par. 5 of the EPPO Regulation, as well as the provision of the European Public Prosecutor which refers to par. 2 and 3 of the same article.<sup>1</sup> The European office retains the power of exercising the action and the inertia of the authorities, as well as consider the refusal as deferred case (Herrnfeld, 2021).

As regards subsidiary action, Article 25, par. 4 of the EPPO Regulation states that EPPO

“may, with the consent of the competent national authorities, exercise its competence for offences referred to in Article 22 in cases which would otherwise be excluded due to application of paragraph 3(b) of this article if it appears that the EPPO is better placed to investigate or prosecute”.

Par. 3, letter b) of the same article states that the EPPO exercises the best position to carry out investigations and to exercise criminal prosecution.<sup>2</sup> This occurs through the consent of the

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<sup>1</sup>Article 34(2) provides for referral of the case in the event that they reveal that the conditions necessary for exercising the attribution pursuant to Article 25(2) and (3) no longer exist. Article 34(3) provides for referral in two cases: when the damage caused by the offence is less than EUR 100,000 and “taking into account the degree of seriousness of the offence or the complexity of the proceedings in the individual case, it is not necessary to conduct investigations or prosecute at Union level and it is in the interest of efficient investigations or prosecutions” provided that the College has issued guidelines in this regard; as well as when the EPPO exercises its attribution respectively to offences that concern EU expenditure and the “actual or potential damage to the financial interests of the Union is not greater than the actual or potential damage caused to another victim”.

<sup>2</sup>Recital 60: “The EPPO could appear to be in a better position, inter alia, when it would be more effective to leave the investigation and prosecution of the offences concerned to the EPPO due to their transnational nature and scope, when the offences

competent national authorities which contain the power to exercise the action.<sup>3</sup> It, therefore, does not mean that the national prosecutor and/or EPPO can exercise criminal prosecution for the same crime in the national territory twice.

The situation changes with regard to the hypothesis that the European Public Prosecutor exercises the action in a certain country and the national authorities in another country do the same within the framework of their own jurisdiction (Zuidema, 2023).

### **Exercise of the action and the related act**

To exercise the criminal action, a related act is also needed. The adoption of the criminal action, which is understood in an abstract way, considers the request for a decision from the judge in its content. He can conclude the requests that are different from the convictions as well as archive them at an advanced stage.

The request for archiving is considered as a movement that conditions the criminal action. This is a position that in truth

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involve organised criminal organisations, or when a specific type of offence could constitute a serious threat to the financial interests of the Union or to the credit of the Union institutions and the trust of the citizens of the Union”.

<sup>3</sup>It is not expressly provided that national authorities lose the power to exercise the action. In our opinion, however, the conclusion is supported by two sets of reasons: the first is art. 25, par. 1, which although it does not seem to be directly applicable to the case in question, could be considered to express a general principle of non-competition of actions; the second is that the circumstance that the EPPO is unanimously judged to be in a better position to investigate and formulate the charge seems to support the need for it to be the only one to exercise, precisely, the action.

defines the exercise of the action, as an alternative to the request for archiving, according to the national law in force. Likewise, as an alternative modus, it is noted that the term of the investigations remains annulled.

The exercise of the criminal action consists of the activity of the public prosecutor upon receipt of the news of the crime. The position, that is found next to the main criminal action, to the precautionary action and to the executive action, is rejected.

The option chosen is that of exercising the action of the act in which the charge is formulated. The action thus has a precise nature and consists not in a request but in the jurisdiction of a request for conviction. The acts used are those provided for by national law in relation to the referral to trial and in consideration of the hypothesis of exercising the action within the scope of the suspension of the proceedings.

Such acts concern the probation, the direct summons to trial, the forced formulation of the charge, the contestation of the connected crime, the preliminary hearing and the debate within the course of the abbreviated trial.

The acts of the exercise of criminal prosecution by the European Public Prosecutor are part of the framework of the corpus juris and of the national legal system. The preliminary investigation activities do not involve the exercise of the action, as happens with the action that considers the beginning of the procedural

phase.

The EPPO Regulation has been regulated by the corpus juris. This, through Art. 35 refers to the closure of the investigation, which precisely states that the European Public Prosecutor is delegated to submit a draft decision for the exercise. This means that the investigation has come to a conclusion. It is clear that the decision thus exercises the action at the end of the investigative phase.

The filing, within the system of the EPPO Regulation, and the related request does not imply the exercise of the action. Art. 39 of the discipline refers to the alternatives of criminal action. As a conclusion, art. 36 is taken into consideration. It is related to the exercise of criminal action before national judicial bodies lead to a judgment, as a step parallel to the exercise of the action and the judgment.

The EPPO Regulation does not include all the acts of criminal prosecution. Perhaps this has to do with the fact that some actions depend on national law, according to Art. 5 of the EPPO Regulation. These are forms of action that are not defined from the regulation under examination. It is, therefore, a discipline that fills the content of the relevant reference according to the pre-established spirit of national law.

### **Decision and procedure for the exercise of the action**

The procedure and the taking of the decision for the exercise of the preliminary criminal action are recalled in the EPPO Regulation. The term that refers to the indictment against a single subject is considered in a natural way.

Art. 35 provides for the end of the investigations, according to the work carried out by the European Delegated Prosecutor (EDP). The content of Art. 56 of the EPPO Regulation is addressed as a proposal for a decision that follows the supervisory procedure. According to art. 56, par. 1 of the EPPO Regulation, the EDP takes into consideration the draft indictment.

After the proposal of the EDP it can alternate the exercise or not of the action to the referral. In the case of national authorities, the archiving and access to a simplified procedure, according to Art. 35, par. 1 of the EPPO Regulation, is oriented towards the path of simplified procedure of the criminal action.

When the simplified procedure for the offences of Art. 3, par. 2, letters a) and b) of the PIF Directive is proposed, the damage to the budget of the Union must not exceed the damage caused by another victim.

The EDP preventively based on Art. 40, par. 1 of the EPPO Regulation, takes into account the consultation of the national

authorities. This occurs in cases of crimes in which the national authorities have an interest. The EPPO pursues, according to Art. 34, par. 3 of its Regulation, the referral of these activities from the European Public Prosecutor.

Before a final decision is taken, which includes future national actions and the *ne bis in idem*, the results achieved specify the binding effects for the European Public Prosecutor.

The EDP sends to the European Public Prosecutor, according to Art. 56, par. 3 of the EPPO Regulation, what has been received from the Permanent Chamber within the term of ten days, thus integrating the relevant documentation with its own assessment.

The Permanent Chamber decides and accepts the proposal charging the EDP to implement, according to art. 35, par. 1 of the EPPO Regulation, its decision. Therefore, the Permanent Chamber is responsible for the relative decision, that is, a state forum to exercise the action regulated by art. 36, par. 3 of the EPPO Regulation.

The EDP's proposal is not expressed and depends on the adoption of a decision by the collegiate body within twenty-one days. This occurs only in the case that the relative proposal of the EDP decides to exercise criminal action and no other determinations derive from art. 36, par. 2 of the EPPO Regulation. The insertion of the provision, within the article that specifies the exercise of criminal action, recalls the draft

decision. It brings the case to a judgment within the term of twenty-one days.

The proposal of the EDP leads to a contrary reasoning and the silence of the Permanent Chamber paralyzes the continuation of the proceedings. The proposal thus accesses a simplified form of the exercise of the action with a technical way.

The exclusion of the simplified procedures from the silent-assent mechanism, according to the EPPO Regulation, has as its object the distinction of the ordinary exercise of the action, that considers applicable, according to Art. 36 of the EPPO Regulation, the criminal action before the national judicial bodies. Art. 36 also refers to the decision that leads to the judgment of the simplified procedures, relevant for the absence of a judgment to a strict and precise term.

Art. 40, par. 1 highlights forms of exercising the action, namely the referral of provisions not appearing in Art. 36, of the EPPO Regulation. The discipline established by the Permanent Chamber results in silence, offering the time dedicated to the adhesion of the principle of favor actionis. This action is understood as an ordinary action not simplified by the EPPO Regulation.

The existence of the requirement of the eadem ratio is excluded, which is necessary for the application of a rule that is outside of cases provided for with an express way. The relative silence-

assent is not applicable when the proposal of the EDP is directed and brings to trial the case of a member state, that is different from the membership of the EDP. It does not exercise with a direct way the action outside its own jurisdiction.

The initiative of a colleague operating in the country of destination is a scenario, that intervenes in the Permanent Chamber, according to the spirit of the EDP, which orders its decision. The EDP proposal examines the case file for the adoption of a final decision for the instructions to the prosecutor. The decision takes place within twenty-one days from the moment the EDP proposal brings the case to trial. This juncture regulates the collegiate body that includes the possibility of deciding to archive the case, according to art. 36, par. 1 of the EPPO Regulation. The EDP oriented to the exercise of the action can, therefore, completely block the relevant power of the Permanent Chamber.

The Permanent Chambers have the power to delegate to the EDP the decision to bring the case to trial, according to Art. 36, par. 1, 3 and 4, as well as art. 39, letters a) to f) of the EPPO Regulation, given that specific requirements are met, according to art. 10, par. 7 of the same Regulation.

The relevant delegation concerns the provisions that are not admissible in the case of simplified prosecution, such as testimony provided for by Art. 40, par. 1 of the EPPO

Regulation, which refers only to the intervention of the Permanent Chambers. The delegation as a provision allows for archiving, according to Art. 39, letter g) of the EPPO Regulation, in the event that the relevant evidence is missing. The assumption for this is based on inaction.

It is asked whether the decision of the Permanent Chambers is valid for the authorization and exercise of the action addressed to the EDP? From a practical point of view it becomes evident when it coincides with the formulation relating to the accusation that respects the requirements of its form.

As a response to national regimes, it seems to be the one stated by Art. 13, par. 1 of the EPPO Regulation, which establishes that the EDP is responsible for the judgment that disposes the power to formulate the relative indictment. An opposite solution seems difficult and surmountable.

The same applies to the exercise of a tacit criminal action, which verifies that the EDP has requested the referral in the case of judgment within the terms provided. The decision of the Permanent Chamber is not the act of exercising the action. It does not contain all the requirements required by law, necessary for an act separate from the EDP, compliant with the legal model.

As a consequence, the decision for the Permanent Chamber assumes an internal value, that is not possessed by the relative

procedure and its actors. The external effectiveness is reserved to the act of the EDP. Thus, the analogy of a written consent by the prosecutor is operated when he wishes to order the arrest and request the precautionary measure.

The analogy is valid and effectively considers the determinations concerning the Permanent Chamber, which does not produce external effects when the EDP deviates from indications received in a different manner. What is not taken into consideration is that the act is performed by the EDP. If the chamber decides to archive and the EDP exercises the action, the process is valid and established.

As a consequence, the problem of liability arises, which is regulated by its own judge. The relative defects regarding the decision of the collegiate body cannot affect the act of the EDP.

The doubt is relative and concerns the content of the decision for the Permanent Chamber whether it should be limited to the authorization of the exercise of the action to give indications to the EDP, who have exercised their power of action.

The discipline of the procedure, that follows for the decision to exercise the action, is completed by national rules, according to Art. 5 of the EPPO Regulation as well as from what is pre-established by the procedure relating to the notice of conclusion of preliminary investigations. This is a notion that has to do with the rights of defense and the participation of the interested

parties, i.e. the investigated person, who is limited after the relative referral.

### **Nature of the control of the Permanent Chamber and favor actionis principle**

Art. 36 of the EPPO Regulation highlights the Permanent Chambers not to pronounce according to the nature that is included in the archiving at the time that the EDP requests for the case that comes to trial. This concept admits that the European legislator wants the case not to be dismissed at the time that the EDP is convinced for the action that is exercised, according to the existence of the principle of favor actionis of the EPPO Regulation (Rafaraci, 2019).

It is a principle that in case of doubt implies, that the simplified procedure for criminal prosecution, is not applied. The investigations of the EPPO involve criminal prosecution before the national jurisdictional body, that is competent. This is a general approach, like the role assumed by the Permanent Chambers, within the scope of the determinations of their action. At this point a question arises: how the legislator has combined the rule with Art. 36 of the EPPO Regulation?

The reasoning of this provision excludes the main concern that avoids exercises in action. Otherwise, the possibility that provides for archiving, in the event of the request of EDP to

bring the case to its own judgment, is maintained. It seems that the single Permanent Chamber is called to exercise control over inaction. It avoids that the European Prosecutor's Office remains inert in front of the fact and deserves to be submitted to the relative attention of its own judge.

The *favor actionis* principle prefers the action that respects the inaction, addressing the forms of action, namely the simplified and ordinary one, based on the relative discipline of Art. 36, par. 1 and 2 of the EPPO Regulation. This discipline applies the request for exercise to an ordinary form.

According to Art. 40, par. 1 of the EPPO Regulation the relative choice requires the simplified form for the tacit consent procedure, that is, an effective control for the chamber that is based on the procedure with agreed terms for its own suspect. We move to the end of an exercise of the criminal action that contains the relative waivers in favor of the suspect, which justifies the exclusion of a mechanism relating to tacit consent that does not guarantee the control of the Permanent Chamber, as a choice of the EDP. This is a circumstance that contributes and fuels the main interest for the European legislator, through the discipline of Art. 40 and 41 of the EPPO Regulation. These articles avoid that the exercise of the action is totally renounced to a referral by the national authorities.

The Permanent Chamber has oriented itself towards the control

over inaction in situation that decides and exercises the action in the case of imputation. This is a negative indication, which is based on Art. 13, par. 1 of the EPPO Regulation. This article provides that the EDP has the power to formulate the imputation. The relevant provision does not exclude that other bodies, such as the Permanent Chamber, influence the determination of the EDP without providing anything in this regard.

A contrary position finds space in Art. 56 of the EPPO Regulation, which establishes that the EDP formulates its proposal in the report, that attaches the draft indictment. The provision, thus, deduces that the request of the EDP contains the relevant wording for the indictment at the time it is modified, specified through a draft. It seems that this opening evaluates the Permanent Chamber to the wording relating to the indictment. This is a task that falls to the collegiate body, which comes to the conclusion that the EDP retains the power of indictment after it has formulated the relevant proposal.

It is convincing that the powers of the person, who draws up the indictment, are the same as those of the EDP, which is responsible for the relative exercise of the action. The formulation of the indictment, which prohibits the Permanent Chamber from enjoying and providing indications translated from the EDP, is excluded.

The existence of a power of direction, which is based on Art. 35, par. 2 of the EPPO Regulation, establishes the power for the chamber to give other instructions to the EDP, thus creating a broad power. This is a power which includes and invites to carry out other and new investigative acts. Such acts lead to a modification of the indictment and to its relative drafting.

The power thus prevents the prosecution from formulating non-resistance to its own judgment, which protects other needs. It is the same Art. 35, par. 2 of the EPPO Regulation, which allows the possibility of adopting as an alternative the indications and instructions with a definitive decision, which establishes the power for the Permanent Chamber to rewrite the indictment without excluding it.

The wording appears broad and reads the provision as a referral to final decisions included in par. 1 of Art. 35 of the EPPO Regulation, namely the exercise of criminal prosecution and referral to the case, archive and/or adopt of the simplified criminal prosecution procedure. Art. 56 of the EPPO Regulation presents the draft indictment as optional, thus constituting a support to the decision of the chamber and to the core of the control carried out by the collegiate body.

When the EDP requests the action to come to trial, it presents the draft indictment. The Permanent Chamber presents general indications that do not replace the formula of the accusation.

The aim of the chamber is to avoid inactions that are undue. All this does not exclude that the control of indictment has been carried out by national jurisdictional bodies, according to the applicable national law.

The existence of Art. 36 of the EPPO Regulation in front of the request to exercise the action is not task of the Permanent Chamber, that is to formulate the indictment and to order the archiving because in this way its intervention is made necessary. The power of the EDP to act directly, without the involvement of the collegiate body, is foreseen. Some profiles under discussion, in this regard, are presented.

The chamber, when the EDP decides to exercise the action in ordinary form, establishes that the case is referred to the national authorities expressing the determination of the exercise of the action. This power seems in fact to prevail due to the nature of the control. The Permanent Chamber thus prevents and does not formulate the accusation because the relative power is in favor of the authorities, which prevents the request for action.

The power of referral is a prerogative that is generally part of the Permanent Chamber, according to what is provided for by Art. 10, par. 2, letter d) and art. 34 of the EPPO Regulation. This provision means that the referral is made late. The specification of par. 2 of the same article adds that the referral initiates the criminal action.

The indication certainly does not make sense for a single location to decide on the referral given that the procedure includes the exercise of the action as an alternative to it. It can be deduced that the power of referral states Art. 57 of the EPPO Regulation. The power of referral cannot solidly support the decision to exercise the action. In practice, the one decided by the chamber is repeated before the EDP expressing the position to be taken. The need for a procedure for the decision of the chamber, upon request of the referral to trial, explains and decides the indictment formula. A formula that is competent to examine, control the jurisdiction that is exercised the criminal action, according to Art. 34, par. 3 of the EPPO Regulation.

The chamber tries to avoid the renunciation of the action outside of cases provided for by law. It does not have the relative control that makes explicit the power to give other instructions in its address. This is a conclusion that together with the legislative system allows and outlines the scheme of the powers of the chambers in front of the possible requests of the EDP. Based on art. 34, par. 1 of the EPPO Regulation the chamber decides to refer the case to the national authorities.

When the EDP requests the ordinary exercise of criminal prosecution, the Chamber authorizes the action and decides the country in which it is exercised. It does not order its archivation as provided for by Art. 36, par. 1 of the EPPO Regulation. The

exercise of the action in a simplified form is a different and certainly quite complex matter. It seems a negative point of view that Art. 40, par. 1 of the EPPO Regulation makes the request of the EDP necessary.

The exclusion of such a possibility operates to the simplified exercise consistent with the role of the Chamber that controls and avoids a form of inaction. Art. 40 of the EPPO Regulation refers to the proposal of EDP because it represents a typical case that does not exclude the possibility that the Chamber decides its own initiative based on Art. 10, par. 5, Art. 35, par. 2 of the EPPO Regulation and on recital n. 78.

The Permanent Chamber orders the EDP to exercise the action of criminal prosecution. Such a limitation does not provide for the adhesion and reconstruction of the nature of control of the collegiate body that avoids inaction. For the same reason, the proposal of referral to the national authorities, as an alternative to accepting the relative request, decides whether the EDP exercises the action and not its own national body. The order to exercise the action in a simplified form is considered in a way that includes the considerations made. In the case of archiving, the Permanent Chamber adheres to the request of the EDP and orders the exercise of the action in an ordinary form. In this case, the lack of the request does not proceed with simplified forms.

In this regard, we can say that Art. 35, par. 2 of the EPPO Regulation allows and gives further instructions to the EDP. Such a provision prefigures the carrying out of investigative acts and specifies the problems of the investigative act (Burchard, 2021).

This is consistent with the approach of the regulation, which reserves the direction of its own investigations to the collegiate body. The European Public Prosecutor's Office extends the powers of the Permanent Chamber, according to art. 335, par. 2 of the EPPO Regulation. Art. 40, par. 1 of the EPPO Regulation, does not prevent the Permanent Chamber from resorting to the simplified procedure even in the absence of a request (Panzavolta, 2018).

### **National jurisdiction exercising the chosen action**

The choice of the national jurisdiction concerning investigations of the EPPO is taken into consideration (Herrnfeld, 2018; Luchtman, 2018). The choice of forum arises only when two or more states have jurisdiction over the same case. The EPPO has not precluded from acting a country that does not have the power of *ius dicere*, according to Art. 26, par. 1 of the EPPO Regulation.

Art. 26, par. 3 of the EPPO Regulation establishes a case handled from EDP, i.e. in the place where the centre of the

criminal activity is located and/or in case that several crimes are connected with the place where the crime was committed. Most deviate from indications that justify and take into account criteria that are listed, as priority in the place of habitual residence of the suspect/defendant and the nationality-place where the main financial damage occurred.

These are criteria that come into play when the start of the investigation takes into account what is referred to in Art. 26, par. 5 of the EPPO Regulation. These criteria allow the Permanent Chambers to reassign a case to the EDP or to a state other than that in which the Prosecutor carries out the investigation until the prosecution even if the consolidation and/or separation of the cases is necessary (Herrnfeld, 2021).

Again, the assignment has as its objective the decision in accordance with the criteria of par. 4 of the same article, i.e. the general interest of justice. Art. 36 of the EPPO Regulation regulates the decision of the prosecution in the country in which the EDP operates the assigned case.

The Permanent Chamber decides when the decision of the end of the investigation reassigns the sufficient and justified reasons, according to Art. 26, par. 4 and 5 of the EPPO Regulation. The reassignment of the case is decided by the Permanent Chamber after a proposal of the EDP, according to Art. 35, par. 3 of the EPPO Regulation.

At the time of prosecution, the Chamber decides to reassign the case when there are sufficient and justified reasons. It is difficult to understand whether the reasons justify the jurisdiction identified in Art. 26, par. 4 of the EPPO Regulation. This is a soluble path, that is, to make the jurisdiction changeable when the investigations are concluded.

Therefore, Art. 26, par. 6 of the EPPO Regulation is referred to, which takes into account the state of investigations and the reasons connected to it. The individual criteria guide the choice of the forum. These are provided for in Art. 26, par. 4 of the EPPO Regulation.

This connection responds to the general interest of justice. The Permanent Chambers takes into account the prosecution of the crime, as the object of the proceedings for the interests of the accused. The need for a positive assessment of the general interest of justice makes the EPPO Regulation in order with some criteria that take into account the decision. Such as the assessment of the opportunity of reassignment of the case that goes beyond the assessment of the choice of the acting state (Zivic, Zandstra, Pit, Vegt-Schouten, 2022).

This function comes from a deviation of the same rule that justifies and takes into account some criteria, such as the assessment and justifiability of a deviation of ordinary rule, that uses criteria that are considered together with the reference of

the interests of justice.

The first criterion is, according to letter a), the habitual residence of the suspect or the accused. As a ratio, it is foreseen and allowed to carry out the trial in the state where the interested party is without being able to move. In this way, it is avoided to resort to the European arrest warrant.

The second criterion is based on letter b). It is relevant with the nationality of the suspect and the accused as a ratio that is similar and considers the respect and reasoning of the fact of the habitual residence as more significant for the accused. As a criterion, the habitual residence of the interested party is useful, which is located in a country that does not have jurisdiction over the fact and is not part of the enhanced cooperation of the European Public Prosecutor's Office that is born.

Another criterion refers to the place where the main financial damage occurs. It assumes primary relevance in the hypothesis of the crime that is committed outside the territory of the Member States with the enhanced cooperation and with the hypothesis that the accused is not a citizen of the states he resides.

As regards the order of priority, the criteria are ordered according to an interpretation that prefers to leave a space for the reference of the places of residence and nationality of the accused. This creates various reflections relating to the right of

defense, that considers and resorts the criterion established in letter b) and in letter a), that is, when the state of residence does not adhere to the EPPO.

In the same way it is impossible to resort to letter b) and to refer to letter c). The provisions affirm the relative indeterminate danger of the formulas that leave spaces relating to arbitration to the European Prosecutor, such as the choice of the place of conduct of the trial. In this way, important spaces are eliminated to reduce the risk and to choose the most appropriate jurisdiction to prosecute. This is a prevention of the phenomenon of forum shopping.

### **Principle of the pre-established by law judge between national and European jurisdiction**

The principle of the pre-established by law judge is a ratio of constitutional inspiration of a dual nature. On the one hand, it prevents the judge from being established a posteriori. On the other, it demonstrates judge's independence, as a legitimately entrusted cause.

Compliance with such a principle allows avoiding the suspicion of assignment in the case that the function has a possible outcome. The reference to naturalness constitutes a limit for the law that establishes the pre-establishment of the judge. The pre-establishment refers to the establishment of the judicial office

and naturalness in the designation of the judge as a natural person.

The supranational sources regarding this principle have different scope and are connected with the European Convention of Human Rights (ECHR) and the Charter of the Fundamental Rights of the European Union (CFREU). The ECHR is based on Art. 6 and limits itself to establishing the judge constituted by law. The CFREU on Art. 47 speaks to pre-constitution.

The ECHR with a simple way prevents that the judge is identified on the basis of indications that come from a source other than the law (Villiger, 2023).

ECHR and CFREU have established the prohibition of providing criteria for the competent judge that are indeterminate and leave excessive discretionary space on the judicial authority. It is, therefore, evident that the constitution by law is apparent.

The evaluation of discretionary spaces is entrusted to the European Public Prosecutor. The choice of jurisdiction is based on the principle of dynamic legality, which is compatible with the principle of the pre-established judge according to the national constitutions and the CFREU. This problem is based on the adoption of the traditional approach that each state has the right to activate a criminal act in other countries. There is no right of pre-established jurisdiction by law.

The rule of guarantee of the pre-established judge refers exclusively to the subject of competence and in the national perspective. It is stated that the guarantee of the principle moves to the European level and goes beyond the scope of each individual country when the criminal action becomes European. Thus, the character of the criminal action is given at a national and European level, linked to the interest of punishment of the crime.

This approach for the crimes of PIF considers and covers the guarantee of the pre-established judge at a European level, that is, the level of participating countries for enhanced cooperation, as a limit attributed to the European Public Prosecutor.

The applicability of the pre-established guarantee is supported by the absence of predetermined criteria, such as the choice of jurisdiction to an obstacle, which is expressed in the right to free movement within the space of the Union.

The jurisdiction for PIF crimes is pre-established at a supranational level since the rules of the EPPO Regulation are relevant to the choice of forum. These rules establish the jurisdiction for crimes attributed to the European Prosecutor. It is not enough that a country is competent for the national rules of jurisdiction. A necessary condition that unfortunately is not sufficient to establish the function of European crimes.

At this point, jurisdiction is necessary, according to the discipline of the EPPO Regulation. In the same way, the competence of a national jurisdiction is part of the European jurisdiction. The criteria identified in the EPPO Regulation are determined and sufficient to comply with the supranational indications for the pre-establishment. The interpretation specifies an intervention, which is autonomous from the law of the Union.

The action exercised by a country of the EDP has to do with the rule that is linked to the place where the focus of the criminal activity is located. This indication is found at the center of criminal activity. Its expression is linked to the place where the accused carried out the criminal activity.

The reference to the place applies to the states committed crimes determining the quantitative conception of this criterion. This normative data is part of Art. 22, par. 3 of the EPPO Regulation, for crimes that are inextricably linked with the PIF, that is, an expression of the approach that follows the requirements of application of *ne bis in idem*. This provision is definitive and solves the problem of indeterminacy that excessively restricts the connection between proceedings. Thus, it is difficult to think of crimes that are committed in different states.

The use of the criterion that is part of recital no. 56 concerns the connection that is essential between PIF and non-PIF crimes.

The recital refers to the crime that is committed principally to harming the financial interests of the Union, that is, a crime aimed at harming the financial interests of the Union to ensure a profit. Such a solution extends to the hypotheses of connection that respect the criterion of *ne bis in idem*, thus facilitating the transfer of the proceedings to the country connected to the crime.

This criterion is duly justified and generic in itself. The vagueness is linked to the criteria listed in Art. 26, par. 4 of the EPPO Regulation, which govern the assessment of the admissibility of the deviation before the choice of a jurisdiction. Such an exception is justified in the place of residence of the suspect, that is, different from the centre of criminal activity.

The EPPO Regulation refers to the criterion of residence, nationality and the request for defense in this sense. The reallocation requests in a reconcilable way the principle of the pre-established judge, which represents a guarantee not only for the accused but also for the judge. The pre-establishment does not derogate the request for defense and risks creating a forum shopping.

Paragraph 4 raises problems in this regard. This interpretation is peremptory in favor of subsequent criteria. The reallocation of the case and the general interest of justice, according to Art. 26, par. 5 of the EPPO Regulation, refer to the needs of prosecution

of the crime. The indeterminacy, according to par. 4 subsists in the interest of justice.

The same formula of discourse also applies to the case that reallocates the moment of the exercise of the action for reasons justifying and taking into account the criteria based on Art. 26, par. 4 and Art. 36, par. 3 of the EPPO Regulation. It is clarified that it is not permitted to derogate from the criteria in the name of interests that are superior to the meaning of the pre-constitution.

The need for a peremptory interpretation and the risk of conflict between the criteria for identifying the jurisdiction of the EPPO Regulation and the principle of the judge pre-established by law offer a margin of discretion, as a guarantee that the pre-determined level is sufficiently respected.

### **Defense rights and jurisdictional control**

Each type of jurisdiction chosen has consequences for the organization of the defense and for the position of the accused. The trial in the country of the place of crime influences the procedural discipline, the substantial applicability of practical aspects as well as the location where the procedural activities take place.

The defense rights are distinct and respect the principle of pre-constitution of the judge. The law establishes the specific

criteria for identifying the jurisdiction, where the trial takes place. Such criteria are based on the right of defense (Zivic, Zandstra, Pit, Vegt-Schouten, 2022).

In this spirit, we note from the ECtHR the *Camilleri v. Malta* case of 2013,<sup>4</sup> according to which the applicant complained that the statutory range provided for a crime committed varied according to Maltese legal system. The ECtHR has analyzed the rights of Art. 6 ECHR. Specifically, the right of pre-constitution that was in contrast with art. 7.

The argument of the foreseeability of the relative sanction had to do with the choice of jurisdiction and the applicable law, i.e. the indeterminacy of national law. In other words, the judgment of the ECtHR has demonstrated the need for protection of the pre-constituted judge, which also guaranteed other principles. The right of defense derives from the states that carry out the investigations and exercise the criminal prosecution. Thus, the defense that operates at a transnational level is necessary (Allegrezza, 2023).

The transfer of the proceedings is considered as a difficulty for the accused. This circumstance implies costs in time, and in communication and coordination between the subjects involved. The change of the applicable law during the proceedings makes the defense strategy that was previously adopted ineffective.

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<sup>4</sup>ECtHR, *Camilleri v. Malta*, 22 January 2013.

The PIF crimes are harmonized and the case from a third country highlights that there are various constitutive elements for the defense activity, that is carried out previously according to the defense investigations. Moving the jurisdiction under the profile of equality of arms violates the right of defense (Wade, 2015).

The EPPO by nature is able to exercise the activities for the countries that the defense presents difficulties. This argument concerns the transfer in the case that all the proceedings of the European Public Prosecutor have a cross-border nature even if the action is exercised in the country of the EDP, that has taken charge of carrying out its investigations.

The evidence is also collected at different stages from that of the trial forming a compendium of probative nature for the national origin of mixed nature (Costa Ramos, 2023).

The countermeasure consists in the creation of a European defence body. The European defender deals with proceedings of a transnational nature. Similar transnational problems concerning evidence and proceedings are connected with the country that is different from that of residence and/or nationality of the accused. In this spirit, related crimes are taken into consideration that are committed in a country other than that of the state of residence of the accused. In this case, obstacles relating to the defence of a linguistic or financial nature also

arise.

The criteria for choosing the jurisdiction are connected with the countries to which the accused has the actual connection. Art. 26, par. 4, lett. c) of the EPPO Regulation doubts about the place where the main financial damage occurred. This situation occurs only if it is impossible to take into account the criterion of residence and nationality previously.

This reasoning avoids problems that arise from the reallocation of the previous case, according to the criteria that par. 4 applies, namely the reassignment and the transfer to the state of nationality and/or residence.

The allocation to a country that is distant is different due to the rule that refers to the center of criminal activity. The criterion is understood in the place of the conduct that depends on the accused who cannot complain.

The case of allocation and the connection between crime and the circumstance of the application of the relative criterion that refers to the place of crime committed is not problematic.

The term connection is rigorous. The interpretative hypotheses previously respect the requirement and the reference to *ne bis in idem*. It is difficult to think of a strict connection criterion that refers to recital no. 56.

The risk of forum shopping and the related implications about the choice of the forum are linked to the natural judge, who has

pre-established the rights of defense, the jurisdictional controls that are incisive. The national authorities evaluate the decision and the choice of the jurisdiction that provides a supranational control (Luchtman, Vervaele, 2014; Panzavolta, 2018). It does not seem acceptable that the national judge declines his jurisdiction when there are national rules, rules of the EPPO in reality.

As an objection the rules regarding the choice of the forum contribute and identify the jurisdiction and national rules sufficient to establish for each individual country the power of the *ius dicere* or not.

The national judge refuses and takes into consideration the knowledge of the cause that is applied according to the indications of the European source. The national judge has the power/duty not to follow the knowledge that is violated by the indications of the EPPO Regulation.

The power of participation enjoyed by the EPPO national decision-making process on the choice of forum is serious for the right of defence. The accused has not adequately asserted the complaints at European and national level in this regard.

### **Ordinary and simplified procedure concerning the exercise of criminal action**

The European legislator provides a form of the exercise of criminal action that is called simplified and regulated by art. 40. The procedure applied is called ordinary because it does not follow the discipline of the same Art. 40.

The two procedures despite the exercise of criminal action are treated by the legislator in two separate categories. It is noted that art. 35, par. 2 seeks to evaluate and respect the simplified procedure of criminal action. The same conclusion is noted in recital no. 81, which seems to contradict the two hypotheses. It seems that these are two different categories. Art. 35, par. 1 refers to the requests of EDP of the separate investigations and the draft decision exercises the criminal action and the evaluation that respects the simplified procedure of criminal action.

The same conclusion is supported by recital no. 81, which seems to contrast the two hypotheses. The same conclusion, according to recital no. 81, seems to contradict the hypotheses and the related disciplines on the inapplicability of the rule of tacit consent, in case of inertia of the Permanent Chamber that respects the request for action of a simplified procedure on the part of the EDP that is not called.

The impossibility of tacit approval of the EDP proposal is linked to specific criteria based on the Permanent Chamber, that evaluates the opportunity and uses or not the simplified procedure that helps the ratio of art. 40. It is clear that this is a choice that delicately considers the agreement with the suspect, which involves the application of a lesser penalty. In this regard, art. 40 states that:

“(...) the applicable national law provides for a simplified criminal prosecution procedure aimed at issuing the final order in the case on the basis of terms agreed with the suspect (...) and the EDP can propose its application (...)”.

The identified forms of criminal prosecution are provided for in the applicable national law that introduces definitive and anticipated proceedings to the trial, such as a simplified procedure.

The scope of application of art. 40 concerns simplifications that do not in themselves lead to the decision that considers the acquisition of investigative documents to the trial file. Thus, the definitions of the procedure in the archiving phase are included in the scope of application, through the use of transaction procedures, that are present in some national legal systems. The simplified procedure has to do with the existence of terms agreed with the suspect as well as the doubt of a phrase that concerns difficulties for the European legislator.

An answer is sought through the ratio of a special discipline. Art. 40 wants the control of a Permanent Chamber on the reward

proceedings thus leading to a favorable treatment. It is indifferent that this type of agreement is concluded and follows the negotiation of a simple consent, that is subject to investigation.

The reasoning is at the basis of the discipline of the EPPO Regulation that does not seem to fail in this case. The reference to the agreed terms that concern the suspect are generic and leave room for the definition of the content of the agreement, the nature and its requirements.

The EPPO Regulation is proposed to autonomously delineate the institute of the compromise to a definitive version, which thus simplifies the referral to simplified procedures, according to what is provided for by national law.

The EPPO Regulation provides that the Permanent Chamber considers and arranges the exercise of criminal action to a simplified form that evaluates the seriousness of the crime as well as the willingness of the suspect to repair the damage, according to the conformity of the procedure to the objectives, general principles of the EPPO. These are also guidelines that are issued by the relevant panel providing for effective protection of the fundamental rights of the accused.

For the same reasoning, the exercise of the penal action, through the formulation of the charge in a simplified form, remains an act of the EDP. Any jurisdictional control examines the relative

act performed and its own inertia as well as the decision of the Permanent Chamber consider the act internal.

As a consequence the national judge precludes the possibility of evaluating its own decision on the basis of criteria indicated in par. 2, according to strategic choices of EPPO. The control focuses on the internal requirements that are foreseen in the chosen special procedure. The EPPO Regulation admits that a jurisdictional control of the agreement is affirmed according to the recital n. 82.

The agreement and the application of the penalty considers the legal effects towards third parties. According to art. 442, par. 1 of the EPPO Regulation, the provision for internal control of a jurisdictional nature is thus founded. It is added that this testifies the compatibility of a broad formulation of art. 40 which refers to the procedure, as a pronouncement of a definitive provision. The admissibility of the intervention of the judge is sustainable for the referral that is applicable.

The European provision provides for the execution before the closure of the proceedings in the case of plea bargaining. Art. 40 is thus interpreted in a precise and rigorous manner. The Permanent Chamber supervises the execution of any obligations that order and close the case in a simple way. The provision does not require the judge to pronounce in a subsequent way. The EPPO Regulation does not provide for anything, therefore

the national procedural rules apply in this regard.

A problem related to the referral, according to art. 40 and art. 35, par. 1, concerns the simplified procedure that is applied only when the EDP considers the investigations concluded. Thus, special procedures as well as plea bargaining do not seem to be the only procedures to access the regulatory provision. The suspension of the proceedings with probation takes on a structure of a contractual nature.

The procedure is established during the preliminary investigations and the public prosecutor gives his consent to the proposal of the suspect. The issue of the completeness of the investigations resorts to the relative prerequisites that concern its application in practice as an investigative activity that has to do with the request for issuance consisting in the acquisition of the news of the crime. In the context of this procedure, the public prosecutor formulates the request for issuance as well as the activity of the adequate investigation.

The practice eludes the principle of completeness and considers as inadmissible the procedures of an internal nature, thus respecting the indications, that are expressed in the EPPO Regulation. It is necessary, in this case, that the EDP requests the investigations.

The proceedings for the exercise of criminal prosecution are not among those that are simplified and only consider the subjects

and the general discipline. The ordinary form, as a figure that provides the forms of exercise of the penal action, is different from those falling within the scope of Art. 40 of the EPPO Regulation.

The direct summons to trial of the connected crime is a new fact. The only hypothesis and problem is that the public prosecutor is forced to exercise the action in the event of a forced indictment conceivable when the intervention of the judge with a control function on the archiving is deemed admissible.

### **Exercise of criminal action and participation of interested parties in their decision**

The EDP is the protagonist of the proceedings and the Permanent Chamber decides which direction the proceedings must follow. The lack of the right of participation for the interested parties, i.e. for the suspect/s and the Permanent Chamber, has a decisive impact on the position except in the case where the EDP has proposed to exercise the action and orders the archiving at the time the case is decided.

From a defensive point of view, it is clear that the choice of the jurisdiction that proceeds excludes the interested parties from coherence with the decisions of the Permanent Chamber, which respects the criminal action and requires a subsequent act of the EDP with external effectiveness.

The lack of participation recovers the need for the intervention of the EDP in two ways. Through the instruments of national law, investigations that respect the activity of the public prosecutor are recognized. The participatory vulnus thus seeks to heal and ascertain the accused, who sets the conditions and the effective possibility that influences the decisions of the Permanent Chamber.

There are no reasons to believe that the EPPO Regulation excludes the compatibility between the conclusion of the investigations and its own discipline. This is a possibility that takes on a precise meaning the notification of the notice and the decision of the Permanent Chamber. There are no obstacles for the EDP in this regard.

The request from the Permanent Chamber and the conclusion of the investigations provide for the completion at the end of the investigations. It is reasonable to order the tasks chronologically in the sense that before the request the EDP does not advance that the investigated person has the possibility of exercising the faculty attributed at the end of the preliminary phase.

The related discussions via EDP and external subjects of the EPPO even before the sending of the proposal to the chamber are not foreign to the European discipline and to the national authorities as provided for by Art. 39, par. 3 of the EPPO Regulation and by art. 40, par. 1 within the scope of the proposal

for access to a simplified criminal prosecution procedure.

The notification that concludes the investigations presupposes that the EDP is not addressed to the request for archiving. The European participation deficit admits that the chamber considers and rejects the request for archiving by the EDP oriented towards the action that provides that it itself has notified its own notice. The obstacles relating to its conclusion are various.

The EPPO Regulation is exhaustive with respect to the discipline of the internal procedure and in deciding the exercise of the action that leaves room for the formulation of the proposal of the EDP. Thus, difficulties arise relating to the integration and the procedure of a European nature due to the fact that the Permanent Chamber is entrusted with tasks with relative functions.

The related tasks after the instruction of the Permanent Chamber are carried out by the EDP and under the guidance of the collegiate body, through the use of the mechanism provided for by Art. 35 of the EPPO Regulation. This is an interpretation that lengthens the time necessary for the adoption of the decision and the notification of the notice of the conclusion for the investigations despite the fact that the penal action is exercised.

The control on the choice of jurisdiction that exercises the criminal action is lacking in terms of effectiveness and supranational nature. The role of the suspect and the assumption

of the decision of the Permanent Chamber has a poor defensive effectiveness of the relative subsequent adversarial proceedings as well as representing in itself a criticism that does not allow to remedy in a satisfactory way the lack of participation of a preventive nature. The EPPO Regulation needs future reform.

In the case of reallocation of a different jurisdiction, the Permanent Chamber gives notice to the suspect with the condition that he presents the relative briefs on the matter. This gap can be filled through a guideline of the college relating to the establishment of the adversarial proceedings.

The same needs also concern the victim of the crime that considers the architecture of the EPPO Regulation. These are crimes against the financial interests of the Union that will be the subject of a damaged legal asset. The crimes are attributed to the European Public Prosecutor and connected with the Member States, entities, natural persons, who are damaged by these types of crimes.

### **Exercise of the criminal action and rules of judgment**

The control of the exercise of the criminal action is realized within the EPPO and by the national authorities of the state in which the action is exercised. According to art. 36, par. 1. it is not excluded that the content of the indictment arises at the Permanent Chamber, that is, the possibility of bringing the

necessary consequences to the exercise of the action.

The Permanent Chamber considers that the evidence collected is not sufficient for the final decision indicating thus the EDP to further screening tests. It is asked whether the EDP modifies its proposal by requesting archiving or not. If so, the fact confers the continuous investigation and the proposal to exercise the criminal action is useless.

The possibility that is not mentioned in the EPPO Regulation could also be availed of. The admissibility requires an internal process that starts again with the need to inform the European prosecutor to formulate observations on the new request. It is excessive to prevent the EDP from the position that changes its mind.

The Permanent Chamber has taken into consideration other and new investigations. In this regard, it is appropriate the procedure to begin according to the conditions of the position of a participation foreseen to other interested parties.

The European-internal control is soft given the absence of the power for the chambers to proceed with archiving. It is thought that addressing the EDP other further acts carried out that can modify one's position in a preventive way. But at this level the sentence of non-prosecution is missing. The external European control of the EPPO is not up to the CJEU.

Already art. 42 seems to exclude the possibility that the decision of the CJEU is confirmed. Exceptions are made to the general rules, namely the rule that identifies the national judges and the body of the judicial control on acts of the EPPO. This is a space of intervention that is regulated by par. 2, letter a). It provides for the possibility of investing the CJEU with the means of preliminary reference for the validity of the procedural acts of the EPPO.

The control of the exercise of the criminal action entrusted to an ordinary procedure shows a certain “familiarity” regulated by national law. It does not seem to provide for forms of control on the action that leaves aside the road to the controls provided for by national law. Art. 42, par. 1 of the EPPO Regulation has a general content which provides a positive response to the procedural acts of EPPO and which produces legal effects towards third parties subject to the control of judicial bodies competent with the requirements established by national law.

Art. 42 includes the exercise of the action by the EDP. It considers as procedural acts all those that concern the investigations. A contrary interpretation is provided by recital no. 89 that undoubtedly at the procedural level decides for the exercise of the action. It produces direct legal effects in the sphere of the accused excluding the scope of application of a rule for preparatory acts that do not involve a distinct change

within the legal position of the interested party, as happens to the person who has the role of formalizing the indictment and assuming the status of the accused.

A soft control seems useful to clarify the assessment of the Permanent Chamber when the EDP requests authorization and exercises the criminal action. Article 35 and 39 of the EPPO Regulation request authorization to exercise its criminal action according to its indications. The system takes into account the evaluation rule that controls the action and does not incur situations that do not respect and do not use the control of determination, such as that of inaction.

The judgment rule follows the Permanent Chamber that needs to refer to art. 39. Thus, the standard of probative nature under the control of the EDP is identified and the Permanent Chamber is directed towards archiving.

The lack of relevant evidence oriented towards criminal action is stated. After the exercise of the action by EPPO, national law through the preliminary hearing establishes that the judge can decide not to proceed when there is evidence for the accused to be acquitted and the elements that are acquired do not allow to formulate a prediction for the conviction.

The objective that restricts and respects the formulation of the preliminary hearing enhances the function that reduces the number of debates. The rule assumes the principle of the in

dubio pro reo at the debate. The judgment rule applies to the preliminary hearing and addresses the EDP and the Permanent Chamber as different objectives.

The EPPO Regulation and the decision of the fee and not of the in dubio pro reo is in favor of criminal prosecution. It is believed that the reasoning coincides with a prediction of conviction. The doubt, if not the question that remains unanswered, is whether the national judge applies the European standard and/or the national one. If national law is affirmed, the judge cannot request a preliminary reference to the CJEU, according to Art. 42, par. 2, lett. a) of the EPPO Regulation.

The judgment rule as provided by Art. 5 of the EPPO Regulation allows for some requirements for the reference to national law. It is the same article that recalls in force the relative consideration, according to the scrutiny of the national judge, who in the procedural phase intentionally leaves the regulation unregulated.

The national control is useful to be read together with recital n. 88, par. 2. The recital establishes the effect of the legitimacy control for acts of the EPPO. That is, for the national judicial bodies that are based on the law of the Union including the regulation and the national law that applies to the aspects that are not covered by it. Thus, it is reiterated what is established by art. 5 that applies to national controls and can also be activated

in art. 42.

### **A not curable action**

The public prosecutor is prevented from renouncing his action. The principle is corrected and is understood, referred to the process that thus involves the duty, power of the judge. It does not refer to the case of the public prosecutor who proceeds in the legislative hypotheses for the suspension and interruption of the same process.

This conclusion poses the introduction to the public prosecutor to prevent the process from reaching its conclusion, which is not automatically applicable to the European Prosecutor. It verifies whether the EPPO Regulation does not provide for the possibility for renouncing its exercised action.

A certain doubt arises from Art. 36, par. 7 of the EPPO Regulation, which states and applies the procedure provided for by the decision, that is inherent to the exercise of the right to appeal the sentence during a proceeding in accordance with the applicable national law. In this way, the EDP archives the case. The rule thus understood refers to cases of archiving in the strict sense. It concerns the hypothesis that the proceeding subsequently places the exercise of criminal action.

As an abstract interpretation the theme of not curing the penal action is expected with an exercised way applying the relative

norm. The problem thus poses the hypothesis that the EDP assumes a position that leads to archiving with a non-technical sense during the process and after the exercise of the action.

Any doubt of existence of the faculty that renounces comes into conflict with the action that is based on the state system. This possibility is not foreseen by art. 36, par. 7 which makes the relative reference that will be empty. The power of renouncement of the action derives from provisions of the EPPO Regulation, according to which the action is considered curable.

### **Effects of investigations and exercise of penal action in jurisdictions of states to enhanced cooperation. Cases of *lis pendens***

The principle of *ne bis in idem* is recognized both at national and European level. It is immediately recalled Art. 4, par. 1 of the Regulation n. 7 ECHR which prohibits the fact that two proceedings are conducted simultaneously (Schabas, 2015; Van Bockel, 2016).

The application of the conventional guarantee is limited. In the case of *ne bis in idem* it occurs in the jurisdiction of the first decision. It can be reached the position that according to the formula of *ne bis in idem* the guarantee that is applied to the regulation does not prohibit parallel proceedings for the same fact and for the same person.

The principle of *ne bis in idem* at European level can be called. It does not mean that the argument of the conflict is in favor of jurisdiction in case that two or more states can follow conflicts in abstract or pursue conflicts in precise for the same person and for the fact that they are addressed at the European level (Böse, 2014).

The resolution of the problem is provided for by the agreements between the states involved. It is also noted recital no. 11 of the Framework Decision 2009/948/GAI on the prevention and resolution of conflicts relating to the exercise of jurisdiction in criminal proceedings. The same instrument seems to be lacking in the profile of useful criteria that identifies the state with a competent manner as well as reference to the interests of the accused.

The relative use of binding criteria establishes parallel proceedings for various reasons. The problems and characteristics of *ne bis in idem* posed by the state that issues the first final judgment to block other initiatives based on the time factor without other considerations for the jurisdiction, that is in the best position to ascertain the relevant fact.

As regards individual guarantees, there is the prohibition of *lis pendens* as well as *ne bis in idem*, which contributes in a preventive way to the risk of arriving at a double sentence on the same fact against the same subject. In this respect, the rules for

identifying the forum seek to protect the right to a pre-established judge.

The choice of forum contained in the EPPO Regulation constitutes a novelty that represents binding criteria for the jurisdiction at European level. It applies to countries that make use of the EPPO enhanced cooperation and have jurisdiction in the event of parallel proceedings.

The EPPO is competent and applies the criteria for choosing the forum, also identifying the jurisdiction that carries out investigations for the exercise of criminal prosecution. Other initiatives are carried out in states other than the one identified with these criteria contrary to the lack of jurisdiction. Art. 25, par. 1 of the EPPO Regulation considers in a pleonastic way the reference to relations with a country that has the power to act but does not exercise its competence for criminal conduct.

A shared reconstruction for the prohibition of the exercise of the action does not apply to national authorities but also to any private individuals to a country, that is different from that of the EPPO that acts the power of action. For European criminal law such an instrument is able to resolve with a binding manner the question of *lis pendens*.

This mechanism is applicable in cases of crimes attributed to the EPPO as well as for economic crimes provided for by Art. 22 and 23 of the EPPO Regulation and the principle of attribution

(Dukat, 2023). It is considered that the discipline as choice of forum is binding for the member states as well as that of EPPO which precludes and exercises the attribution of a basis provided for by art. 25. In these cases the discipline of the choice of forum is binding for the states even when EPPO precludes exercising the attribution.

The European Public Prosecutor's Office enjoys the relative attribution and as a consequence the scope of applicability of the regulation and the procedure remains to the national authorities. The competence of EPPO belongs to articles 22 and 23 which are separate and outline the cases of a failure to exercise. On the contrary, the formulas provided for by articles 26 and 36 seem to be applicable only to the proceedings that are effective and managed by the European Public Prosecutor's Office.

A negative conclusion is consistent with the principle of pre-established jurisdiction which applies in cases when EPPO acts for the European interest but in a weak way.

If the crime is attributed to the EPPO the mechanism does not operate when the parallel proceedings are conducted by a Member State of the Union as well as in the case of a member of the enhanced cooperation of a third state of the Union. In both cases there is no obligation to respect the criteria for choosing the forum for the EPPO Regulation, which are not binding for these countries.

The breadth of the relative mechanism is not so lacking but depends on the approach that takes into consideration the issue of asymmetric competences. One or more states that are part of the enhanced cooperation are also competent regarding the penalty that is relevant according to art. 25, par. 3, letter a) of the EPPO Regulation that admits the possibility for parallel proceedings.

The problem does not present and does not exclude in the EPPO crimes that attribute a certain monopoly regarding the conduct of investigations for the exercise of criminal prosecution. In the EPPO area, there is only one country that has its own jurisdiction, any initiative by the state that within other legal systems seems to be illegitimate.

The EPPO Regulation ultimately offers criteria that resolve jurisdictional conflicts of a vertical nature that occur between member states and EPPO as well as horizontal dealing with different jurisdictions.

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